# Are Trial Lawyers The Devil? Liability and “Tort Reform”

A central issue of business ethics concerns the degree to which businesses or organizations are responsible for harms incurred by the consumers of their products. To give a few famous examples:

* **Medical Malpractice.** One of the older questions of liability has concerned medical professionals’ responsibility for surgeries or procedures that fail to achieve the desired result. In the U.S., this has been a major issue of civil lawsuits since the 1800s, with physicians consistently arguing that they are being victimized by so-called “ambulance chasers” and trial lawyers arguing they are protecting the rights/interests of patients who would otherwise be wholly at the mercy of the physicians. Before becoming president, Abraham Lincoln frequently represented both physicians and patients in these sorts of trials.
* **Automobiles.** To what extent are car manufacturers responsible for injuries that occur to drivers or to others? It is ethical for them to make cars that easily “roll over”? That lack seatbelts, airbags, or other safety features? That explode when hit from behind (the infamous Ford Pinto)? That emit high levels of pollutants? That don’t undertake crash safety? **Ralph Nader,** a famous consumer rights activist, first made these into “big” issues with his 1965 book *Unsafe at Any Speed.* However, this has remained a major area of concern in recent year, as Volkswagen was caught cheating on emissions testing, and the faulty ignition in GM cars may have led to 100 deaths.
* **Tobacco and Asbestos.** In 1998, the tobacco companies paid >$200 billion to state governments for the damage/cost of their mispresenting the dangers of smoking for the past 40 years. Asbestos manufacturers and installers faced similar accusations, though the settlements have been far smaller (of knowingly misrepresenting the dangers of their produces)
* **Product Liability.** There have been numerous famous cases of corporate liability past 30 years. McDonalds (1994) lost a lawsuit to a customer injured by spilling overly hot coffee on her lap. Dow Corning (1992-2000) paid billions to recipients claiming to suffer from serious side effects from breast implants. Exxon Mobile (2001) paid $500 million for damage done by an oil spill. In recent years, For-profit colleges (LeCordon Bleu, Corinthian College, and others) have lost lawsuits for deceiving students about job prospects or other issues.

Of course, these sorts of issues are not limited to big business (or big medicine): nearly every business (and every consumer) needs to be aware of the potential consequences if a product causes harm. In this lesson, we’ll be considering some general issues related to liability, including the problem of determining *who* is responsible for a harm and *how* (or *whether*) they ought to be held responsible for this. In the U.S., the question of how to handle issues related to product liability and medical malpractice has been a major area of political conflict in recent years, but it hasn’t always broken on “traditional” partisan lines. On the one side, groups such as the Chamber of Commerce and the American Medical Association have argued that “frivolous” lawsuits are harming business/medicine by driving up costs and reducing innovation. On the other side, groups like the American Bar Association and consumer rights groups have argued that current systems ought to be maintained and strengthened.

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| Table 1 Size of Commercial Liability Markets (2013). American firms and individuals spend significantly more on commercial-liability insurance (including medical malpractice insurance) than do those in other countries. From www.swissre/sigma.   |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | |  |  | Direct premiums written, 2013 (in $Billions) | |  | Liability as a percentage of | | | Rank | Country | Liability insurance | Total insurance (nonlife) | Gross Domestic Product (GDP) | Total nonlife | GDP (1) | | 1 | U.S. | $84.0 | $531.2 | $16,802 | 15.8% | 0.50% | | 2 | U.K. | 9.9 | 99.2 | 2,521 | 10.0 | 0.39 | | 3 | Germany | 7.8 | 90.4 | 3,713 | 8.6 | 0.21 | | 4 | France | 6.8 | 83.1 | 2,750 | 8.2 | 0.25 | | 5 | Japan | 6.0 | 81.0 | 4,964 | 7.4 | 0.12 | | 6 | Canada | 5.2 | 50.5 | 1,823 | 10.3 | 0.29 | | 7 | Italy | 5.0 | 47.6 | 2,073 | 10.5 | 0.24 | | 8 | Australia | 4.8 | 32.7 | 1,506 | 14.7 | 0.32 | | 9 | China | 3.5 | 105.5 | 9,345 | 3.3 | 0.04 | | 10 | Spain | 2.2 | 31.0 | 1,361 | 7.1 | 0.16 | |  | World | $160.0 | $1,550.0 | $61,709 | 10.3% | 0.26% | |

## Some Important Definitions

Debates over the ethical issues regarding product liability often involve a number of important concepts drawn from the law, especially those related to *torts*. Here are a few of the most important.

* **Tort**—A **tort** is a civil (as opposed to a criminal) “wrong” that causes a person to suffer a loss or harm, and for which the victim is owed restitution. Torts are different from **breaches of contract,** where a firm or individual is held liable because they failed to live up to the terms of an implicit or explicit contract. In countries based on the “common law” (the US, Canada, Britain, etc.) torts play a central role in issues concerning product liability and medical malpractice. Depending on the issue, torts may be judged by standards of “negligence” or “strict liability” (see below).
* **Fault Liability**—A **tortfeasor** (person committing a tort) has **fault liability** (or is **negligent**) when he or she harms someone by failing to take “due care” when acting (or failing to act). For example, an auto company that knew its car was prone to roll over might be found negligent, since a “reasonable person” could have predicted that this design flaw would harm drivers. Similarly, if you hit a person while fiddling with your phone (negligence), you could be liable. It’s important to note that being “at fault,” doesn’t necessarily mean you acted “immorally” (though it might)—it simply means you failed to act as a reasonable person would have.
* **Strict Liability**—While some torts rely on negligence standards, others are judged according to a **strict liability** standard, according to which a tortfeasor is responsible for harms caused by its actions *even if* it wasn’t negligent or otherwise irresponsible. For example, if you injure a person using dynamite (a very dangerous substance, for which the law imposes strict liability), you could be liable for this, *no matter how much care you took.*
* **Joint-and-Several Liability.** In many tort cases, *multiple* tortfeasors were involved in causing the harm (e.g., the firm that made the product, the retailer that sold it, etc.). Under the standard of joint-and-several liability, each of the tortfeasors is responsible for ALL of the damages, regardless of how big/small their contribution happened to be. So, rich firms with “big pockets” may be forced to pay quite a bit, even if their “contribution” to the harm is less than that of the (much smaller) local retailer. This is the most common standard for tort cases, and is designed to maximize the chance that the injured party receives compensation from *someone* involved in causing their harm.
* **Proportional Liability.** In a few places, standards of joint-and-several liability have been replaced by proportional liability, where tortfeasors’ responsibility to pay damages is *proportional to their contribution to the harm.* This standard is meant to ensure that penalties track *contribution to the harm* and not *ability to pay.* However, it introduces an additional layer of complexity for judges and juries, and raises the probability that the injured party won’t receive full compensation.
* **Compensatory (or Actual) Damages**—The tortfeasor may be forced to pay compensatory (or “actual”) damages to make up for harms suffered by victim (medical costs, lost wages, pain and suffering, and so on). The primary purposes of these damages is to leave the victim *no worse off* than before the harm occurred.
* **Punitive Damages**—In order to deter future bad behavior, tortfeasors may also be forced to pay **punitive damages** to victims. Since the awards must be big enough to “make a difference” to the firm or individual in question, they are frequently larger (and occasionally much, much larger) than the compensatory damages.

## What is the Purpose of Torts and Liability?

Unsurprisingly, legal scholars and business ethicists disagree on what the *purpose* of torts is, and what it would mean to have a “justified” or “good” system of tort law. There are at least two main types of theories:

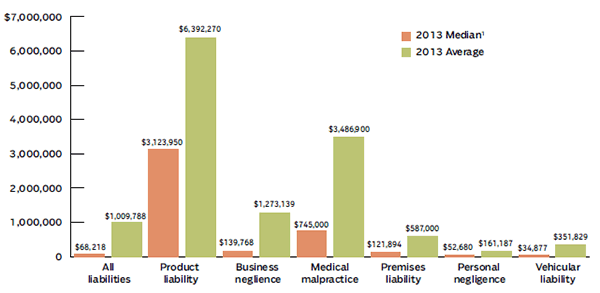
**Instrumental Theories of Torts.** According to instrumental theories of torts, a well-designed tort system is a *tool* for pursuing a more efficient economy and/or more fair society. **Economic theories** of torts (famously defended by the libertarian judge **Richard Posner**) hold that these laws force firms to “internalize” various **negative externalities** (the harms they cause to others), and help achieve a socially “optimal” level of risk-taking (by ensuring that the “costs” of various risks are delegated to those who can best bear them). On these theories, decisions concerning strict or fault liability (or the size of damages) is simply a matter of figuring out the costs involved in each. Strict liability will lead to more lawsuits (costly), but is easier to prove than fault liability (less costly). Similarly, the more you want to discourage the behavior in question, the bigger the punitive damage award should be. Questions such as “Did the victim *deserve* to compensated?” or “Did the person who cause the injury *deserve* to pay that much?” never come up. On this view, tort judgements are something like “taxes” that distribute money from some groups to others and that incentivize “good” behavior. For example, product liability lawsuits serve as a sort of “safety tax” on businesses that make risky products, while medical malpractice suits serve the same purpose in medicine.

Figure 1 Median & mean damages paid by type of injury suffered (2013). From Thomson Reuters, Current Award Trends in Personal Injury.

**Non-Instrumental Theories of Torts.** The non-instrumental theory holds that torts are *wrongs* for which the victim is owed something by the injurer.*.* The relevant moral facts have nothing to do with general “social” goods, but instead deal with facts about the individual case in question: Who caused the injury in question? Was due care taken to avoid the question? How bad was the victim’s injury? The famous philosopher **Judith Thomson** argues, for example, argues for a *Kantian* conception of liability, according to which a person can only be responsible for the harms he or she *causes* (she also argues, however, that we are not responsible for *every* harm we cause). For non-instrumental theories, judgements on things like fault/strict liability or the amount of damages need to track something “real” about the case in question. These theorists have that a good system of tort law is one that does as well as possible (keeping in mind perfection is impossible) in correctly identifying victims and injurers, and in making sure each gets what they “deserve.” In this sense, torts are not much like taxes (since your tax rate doesn’t involve the government judging you in this way).

## What’s the Big Deal with “tort reform?”

Tort law plays a much more significant law in the U.S. than it does in many other rich countries, and American firms and individuals spend (on average) two to three times as their international peers on related legal costs. In many other countries, the job of ensuring product safety and preventing medical malpractice falls primarily to governmental regulatory agencies and/or criminal courts, with firms who violate these rules paying fines directly to the government.

**Why do many organizations want “tort reform”? Why do others oppose this?** Since the 1980s, a number of groups have worked to reduce the impact of torts on US firms and hospitals. The general idea is a follows:

1. In product liability and medical malpractice cases, juries can (and do) award *huge* “punitive” damages to those harmed. These damages are often large enough to bankrupt the firm, hospital, or individual in question.
2. These organizations have responded to this risk by (a) paying for insurance to cover the potential losses in such suits, and (b) adopting “risk-averse” behavior that minimizes their chance of facing these sorts of lawsuits, even if this limits potential future profits.
3. These costs are passed on to consumers in real ways: by raising costs, delaying the development of new products, and so on.

To solve the problems they see, advocates of tort reform offer a number of solutions (these differ by author):

1. Capping punitive damages, or compensatory damages due to pain and suffering, at some fixed amount.
2. Limiting the use of strict liability, and/or replacing joint-and-several liability with proportional liability.
3. Restricting lawyers’ ability to file class-action lawsuits or to work on “contingency fees” (i.e., the lawyer is paid only if they *win* the lawsuit in question).
4. Limiting the use of torts more generally, by making more extensive use of contracts, criminal law, no-fault insurance (e.g., it doesn’t matter whose fault it is, the victim’s insurance pays), and so on.

When considering the question of whether/how to reform torts, it’s important to remember that the current U.S. use (or overuse) of torts did not evolve in a vacuum. So, for example, critics of tort law are certainly right in noting that U.S. consumers and businesses pay more (and often *much, much* more) for things such as legal services and liability insurance, and it may be that these costs may hinder things like innovation or “risk taking.” However, they often neglect to mention that U.S. consumers also pay (on average) somewhat lower *taxes* for things such as health care, regulatory agencies, and “welfare” programs, which is how other countries (with less torts) deal with similar issues. If torts were “reformed” without making changes to these other systems, there is a considerable risk that tort reforms may simply increase profits for firms, while increasing risks for customers.

## Case Study: Greenman v. Yuba Power Products (1963)

**Description of case:** “Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About 10 1/2 months later [well after the “notification period” laid out in the warranty], he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

**Judgement:** “A manufacturer [Shopsmith] is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” Liability for defective products “is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.”

## Review Questions

1. Do some research, and find a recent news story about a case related to product liability or medical malpractice. Based on what you read, do you think the firm/individual in question is morally responsible for the harm they caused? Should they be held legally responsible? Why or why not? If you are not able to decide, what kind of information might make a difference?
2. What is a “tort,” and what role do torts play in ensuring product safety? Based on the discussion above, how would you describe the “purpose” of torts? Do you favor an instrumental or non-instrumental theory? Why?
3. In *Greenman,* Shopsmith was held *strictly liable* for the harm caused by their product, even though this went beyond the terms of their warranty, and was not caused by negligence on their part. Why do you think the court ruled this way? Do you agree or disagree? Why?
4. Do you agree that there is a need for “tort reform” in the U.S.? Why or why not? If you are in favor of tort reform, give an example of ONE change you would favor (and give an argument for it). If you are OPPOSED to tort reform, explain why you think torts/lawsuits are the BEST way of ensuring product safety.

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